IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,

v.

RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

No. ———.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

S. Nathan & Company, Inc., and New Hampshire Fire Insurance Company pray that a writ of certiorari be issued by this Honorable Court to review the final judg-

ment of the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause affirming the judgment of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in favor of the respondents.

The opinion of the Circuit Court of Appeals was filed March 10, 1941 (R. 118), and is reported in 118 Fed. 2d, 864. Appellants' petition for rehearing was denied without further written opinion by the Circuit Court of Appeals, on April 9, 1941. (R. 167.)

SUMMARY STATEMENT

This is an action by petitioners to recover for the loss of a quantity of a salesman's samples of jewelry belonging to petitioner S. Nathan & Company, Inc., of the value of $14,267.96, contained in a traveling salesman's trunk or sample case while being transported for hire by respondents, as common carriers of goods for hire, from the railroad passenger depot in the city of Indianapolis to the Claypool Hotel in that city, and to subrogate the petitioner New Hampshire Fire Insurance Company to the cause of action of S. Nathan & Company, Inc., to the extent of the partial payment of $9,000.00 of the loss by the insurer to the shipper.

The shipper was not asked, and did not make any representation to the carriers, respecting the nature or value of the goods to be carried.

No contract, written or oral, was made limiting the liability of the carriers.

No fraud on the shipper's part was found or proven.

The Circuit Court of Appeals held that it was the duty of the shipper, though unasked, to inform the carriers of the value of the goods, and that, having failed to do so, the carriers were not liable as insurers, but were liable only for loss resulting from the carriers' negligence. The negligence of the carriers was not pleaded or relied on.

Petitioners contended that since respondents were common carriers of goods for hire, and as such, for hire, undertook to carry the shipper's goods without making any inquiry respecting the nature or value of the goods shipped, and without contracting to limit their liability, and with no fraud on the part of the shipper, the carriers were liable as insurers for the loss of the goods.

STATEMENT OF THE CASE

The case was tried by the Court without a jury. Special findings of fact (R. 83) and conclusions of law (R. 88) were made and filed by the District Court.

The District Court found the necessary jurisdictional facts of diversity of citizenship and amount in controversy (R. 83); that respondent Frank Bird Transfer Company was engaged as a common carrier of goods for hire in transporting baggage to and from the Union Station in Indianapolis, Indiana, for the public generally, and that respondent Red Cab, Incorporated, held itself out to the public as the operator of, and did operate, the Frank Bird Transfer Company (R. 83-84); that on September 29, 1936, the Transfer Company maintained an office or desk at the Union Station, and had there its agent to receive checks for baggage of passengers on trains arriving at the Union Station, which baggage was to be delivered to

some designated address in Indianapolis. On that day one Jack Teichlauf, a traveling salesman for petitioner S. Nathan & Company, Inc., arrived at the Union Station at Indianapolis, went to the office or desk of the Transfer Company at the Union Station, gave to the agent of the Transfer Company the railroad baggage check for a trunk then in the possession of the railroad company that had transported Teichlauf and the trunk to Indianapolis, and instructed such agent of the Transfer Company to deliver the trunk to the Claypool Hotel in Indianapolis. The Transfer Company demanded $1.00 for its transportation charge, which sum Teichlauf paid to the Transfer Company. The Transfer Company gave Teichlauf a receipt for the payment. The receipt contained no conditions or limitations of value or any agreement respecting the transportation of the trunk. The Transfer Company received the trunk about one o'clock, A. M., September 30, 1936, placed it on one of its trucks, and while hauling it to the Claypool Hotel the driver of the truck was held up by robbers, the trunk was broken into, and its contents were stolen. The trunk contained jewelry consisting of diamonds and semi-precious stones owned by petitioner S. Nathan & Company, Inc., of the value of $14,267.96, all of which were then stolen and thereby lost. (R. 84-86.)

Teichlauf made no statement to respondents respecting what was contained in the trunk. Respondents had no knowledge that the trunk contained a large quantity of jewelry until after the robbery had taken place. There was no marking on the trunk or anything about it to inform respondents that it contained jewelry in a large quantity, or anything of value other than ordinary baggage that would be carried in a trunk by a traveler. Respond-

ents did not know that Teichlauf represented a jewelry concern and he did not so advise them. (R. 86.) The District Court found that it was an established custom and usage of the respondents to make an additional charge and to take additional precautions, including the procuring of further insurance, where the respondents were called upon to transport baggage in excess of $500.00, if respondents were notified that such baggage contained articles of such value. (R. 86-87.) There was no finding, however, nor any evidence, that Teichlauf or the shipper knew, or had any notice, of any such custom or usage.

Petitioner New Hampshire Fire Insurance Company paid petitioner S. Nathan & Company, Inc., $9,000.00 under its policy insuring against such loss to that extent, and is subrogated to the claim against respondents to the extent of that amount. (R. 87-88.)

There was no finding, and no evidence, that Teichlauf or the shipper was guilty of any fraud or made any representation of the value of the contents of the trunk.

There was no finding, nor was there any evidence, that any inquiry was made of Teichlauf or the shipper respecting the value of the goods to be carried.

There was not pleaded or proven or found any written or verbal contract limiting or in any manner relating to the liability of the carriers.

There was no relation of passenger and carrier involved, but instead there was present the relation of shipper and common carrier of goods for hire.

The uncontradicted evidence is that the Transfer Company regularly transported trunks and sample cases of

traveling salesmen, and that it was not the custom of the carriers to make inquiries respecting the value of the contents of the trunks or cases to be carried, and no such inquiry was made of the shipper in this case. (R. 52.)

The evidence was uncontradicted that the trunk containing the property lost was known as a jeweler's trunk to those experienced in the handling of trunks and baggage (R. 61, 62, 63); that the trunk was specially made with special snapping locks (R. 34), and bore a type of mark and insignia used by traveling salesmen on their trunks and sample cases. (R. 66, 67.) A photograph of the exterior of such a trunk is found in the record at page 91.

The District Court stated as its conclusion of law on the special findings that the law was with the respondents (R. 88) and rendered judgment for respondent (R. 88). The District Court filed no written opinion.

JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION

The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals became final April 9, 1941 (R. 167), upon the overruling on that day of appellants' petition for rehearing, timely filed (R. 122). This petition for certiorari was filed before the expiration of three months after April 9, 1941.

THE QUESTION PRESENTED

The question presented by this petition is this:

Whether the failure of the shipper of goods, unasked, to inform a common carrier of goods for hire of the value of the goods entrusted to it for carriage, not incidental, or in any wise related, to the carriage of the shipper as a passenger, will relieve such carrier of his liability as an insurer and limit the liability of the carrier to loss resulting from the negligence of such carrier, where no representation is made and no fraud practiced by the shipper respecting the nature or value of the goods, and no contract is made limiting the carrier's liability, the goods consisting of jewelry of the value of $14,267.96 contained in a trunk or sample case carried by a traveling salesman of the shipper.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The Circuit Court of Appeals has erroneously decided an important question of local law in a way probably in conflict with applicable local decisions.

The Indiana state courts hold that a common carrier of goods for hire is liable as an insurer for the loss of the property entrusted to him, excepting only loss from an act of God, the public enemy, inherent defects in the goods or the act or default of the owner or shipper; and have not recognized or applied the rule announced by the Circuit Court of Appeals that merchandise contained in a trunk

while being carried by a common carrier of goods for hire who is engaged in carrying trunks containing merchandise, as well as trunks containing personal effects, constitutes any exception to the rule of the carrier's liability as an insurer.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388.

The Circuit Court of Appeals has erroneously applied to the case of a common carrier of goods for hire the rule applicable only to the case of a common carrier of passengers for hire who carries the personal baggage of the passenger as an incident to the contract for the carriage of the passenger.

(b) The Circuit Court of Appeals has erroneously decided an important question concerning the law of common carriers of goods for hire affecting all common carriers of goods, and affecting great numbers of shippers of goods of large aggregate value, and in every state of the United States.

(c) The question of law decided by the Circuit Court of Appeals has not heretofore been decided by the Supreme Court of the United States nor by any other Circuit Court

of Appeals, and no decision of the State Courts of Indiana, nor any statute, warrants or sustains the decision of the Circuit Court of Appeals in the case at bar.

The true and correct disposition of the case at bar involves a rule of law whose gravity and importance render the decision of the Supreme Court of the United States peculiarly desirable as a court of last resort.

WHEREFORE petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day to be designated, a transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the court below be reversed; and that the petitioners be granted such other and further relief as may be just and proper.

Dated, Indianapolis, Indiana, June 24, 1941.

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 118 Fed. (2d) 864. The District Court did not give a written opinion.

JURISDICTION

The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals became final April 9, 1941 (R. 167), upon the overruling, on that day, of the appellants' petition for a rehearing, timely filed (R. 122) under the rules of the Circuit Court of Appeals. This petition for certiorari was filed before the expiration of three months after April 9, 1941.

STATEMENT

An adequate statement of the case having been made in the petition for certiorari, for brevity a further statement of the case is not here made.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that a common carrier of goods for hire is not liable as an insurer of goods entrusted to the carrier, but is liable only for loss due to the negligence of the carrier, where the goods entrusted to the carrier are valuable jewelry, where the carrier is uninformed of the nature and value of the goods, and omits to make any inquiry of the shipper, there being present no representation by the shipper, no fraud on the part of the shipper, and no contract limiting the liability of the carrier.

2. In applying to the case of a common carrier of goods for hire for the loss of good entrusted to him the rule of liability applicable only to the case of a carrier of passengers for hire for the loss of the baggage of a passenger carried as an incident to the carrier's contract for the transportation of the passenger.

3. In holding that the case of *Toledo, Wabash & Western Ry. Co. v. Hammond,* 33 Ind. 379, is authority in support of the decision of the Circuit Court of Appeals in the case at bar, since the cited case was one involving the liability, not of a common carrier of goods for hire, but of a common carrier of passengers for hire, the property lost in the cited case being carried as an incident to the carriage of the passenger, and limited, therefore, to baggage (or personal effects) excluding merchandise.

SUMMARY OF ARGUMENT

I. A common carrier of goods for hire is liable as an insurer for the loss of the goods entrusted to such carrier, excepting loss resulting from an Act of God, the public enemy, inherent defect in the property carried, or from the act or default of the owner or shipper.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388, 35 N. E. 703.

II. Where goods are delivered to a common carrier of goods for hire, and the carrier makes no inquiry of the shipper, and no false representation is made by the shipper of the nature and value of the goods and no artifice is

used by the shipper to mislead the carrier, the carrier is liable for the loss, however great may be the value. It is the duty of the common carrier of goods for hire to make an inquiry of the shipper, and to any inquiry the carrier is entitled to a truthful answer; but if he make no inquiry, the silence of the shipper does not free such carrier of goods for hire from full responsibility as an insurer for the loss of the goods entrusted to him.

Hart v. Pennsylvania R. Co., 112 U. S. 331, 340, 5 S. Ct. 151, 155;

Muser v. The American Express Co., 1 Fed. 382, 384;

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McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764;

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Walker v. Jackson (Eng.), 10 M. & W. 161, 168;

Drinkwater v. Quenell (Eng.), 7 Mod. Rep. 248, 249;

Kenrig v. Eggleston, 92 Eng. Rep. 932.

III. In the case (not here present) where one purchases passenger transportation of a common carrier of passengers, the carrier's contract with its passenger is only to carry, as baggage, the personal belongings of the passenger suitable to the use of one in his station and to the object of his travel. In such case there is absent any entrusting by the passenger, absent any acceptance by the passenger carrier, of goods and merchandise, and absent any agreement by the passenger carrier to accept for carriage anything other than the personal belongings of the passenger; hence, in such case, and in such case only (not the case at bar), the carrier is not liable for the loss of goods and merchandise of the passenger if the passenger

do not disclose to the carrier the presence of goods and merchandise among his baggage. Such are the following cases cited by the Circuit Court of Appeals in its opinion in the case at bar:

Humphreys v. Perry, 148 U. S. 627, 13 S. Ct. 711;

Toledo, Wabash and Western Ry. Co. v. Hammond, 33 Ind. 379;

Doyle v. Kiser, 6 Ind. 242.

The case at bar is not a passenger case but the case of the carriage of goods for hire, and the rule of the cases cited by the Circuit Court of Appeals is not applicable to the case at bar.

ARGUMENT

Nature of the Action

This is an action against common carriers of goods for hire, for the loss of goods while being carried in virtue of a contract solely for the carriage of the goods lost.

This is not an action by a passenger against a common carrier of passengers for the loss of goods and merchandise received by a passenger carrier as an incident to the transportation of the passenger; and not the case, therefore, in which the carrier contracted only to transport the personal effects of the passenger.

The carriers here did not contract, either verbally or in writing, for a limitation of their liability.

The carriers here made no inquiries of the shipper and the shipper made no representation to the carriers respecting the value of the goods to be carried.

No fraud or artifice of the shipper was proven or found by the District Court.

The Liability of Common Carriers of Goods for Hire as Insurers in the Absence of Inquiry or Fraud

The rule is settled in Indiana that a common carrier of goods for hire is liable as an insurer for the loss of goods entrusted to him. The Indiana courts have not recognized or stated as exceptions to the foregoing rule of liability of a carrier of goods for hire any other than

the following: loss by Act of God or the public enemy, inherent defect in the goods, and the act or default of the owner or shipper.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388, 35 N. E. 703, 704.

The property entrusted to the respondent carriers was goods and merchandise, and the shipper paid the carriers for transporting them as goods and merchandise.

It is common knowledge, and the courts will take judicial notice of the fact, that trunks containing valuable merchandise such as jewelry, laces, furs, silks, dress models and the like, are carried in trunks by traveling salesmen and transported on passenger trains, and are carried to and from passenger depots by local transfer companies whose particular business is hauling trunks containing such merchandise, as well as trunks and other luggage containing the personal effects of travelers. The undisputed evidence is that the respondents were engaged in such business, and regularly hauled trunks of persons arriving at and departing from the union railroad passenger depot in the city of Indianapolis.

It was the duty of the respondents as common carriers of goods for hire to inquire of the shipper respecting the value of the contents of the trunk to be carried, or, by notice to or contract with the shipper, limit their liability, in order to avoid full responsibility as insurers for the loss of the goods. They made no such inquiry, gave no notice of any limitation upon their liability, and made no contract limiting their liability. It was not their practice to make any inquiry. There is no finding, nor any evidence, that notice of any rule of the carriers touching the disclosure of values was ever brought to the attention of the shipper.

In *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 340, 5 S. Ct. 151, 155, this court said:

> "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

In *Rosenfeld v. The Peoria, Decatur & Evansville Ry. Co.*, 103 Ind. 121, 124, 2 N. E. 344, 346, the Supreme Court of Indiana, in an action against a common carrier of goods for hire, said:

> "If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value

> upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier."

The value of the goods to be carried, whether high or low, has no relation to the liability of the carrier as an insurer.

It is no more required that the trunk or other receptacle containing the goods to be carried shall acquaint the carrier with the value of the goods than that the shipper shall in express words inform the carrier of the value of the goods to be shipped. It is instead the duty of the carrier to make inquiry. Neither the container nor the shipper is required to speak the value of the goods to be shipped.

Of course, the shipper must not dress the package so as to give it a mean appearance and expressly to indicate to the carrier that the package does not contain anything of value.

This is not a case in which the appearance of the package entrusted to the carrier spoke falsely that the package contained nothing of value, as in the case of *Chicago R. Co. v. Thompson,* 19 Ill. 578, where the shipper concealed money in a box containing feather beds, or *Gilman v. Postal Telegraph,* 48 Misc. (N. Y.) 372, where bank bills were wrapped in newspapers, or *Everett v. Southern Express Co.,* 46 Ga. 303, where a diamond ring was contained in a small paper bag tied with a string, or *Gibbon v. Paynton,* 4 Burr 2298, 98 Rep. 199, where 100 pounds sterling was hidden in an old mail bag stuffed with hay.

In the case at bar there was no evidence, nor was there any finding, that the trunk in question was of such nature

or construction or bore such markings as to indicate affirmatively that it contained property of inconsequential value. The undisputed evidence as to the appearance and construction of the trunk here is that it was of a type of construction known and recognized as a jeweler's trunk by persons experienced in handling baggage (R. 61, 62, 63).

There was no finding that the trunk was of such construction as to indicate what was contained in the trunk. The District Court found as a fact merely that there was nothing about the construction of the trunk to indicate to anyone that it contained property of great value, nor any marking on the trunk that would have advised persons handling it that it contained a large quantity of jewelry (R. 87). There was no finding of fraud on the part of the shipper, nor any evidence of any fraud, nor was the opinion of the Circuit Court of Appeals grounded upon any fraud of the shipper.

When a passenger delivers to the passenger carrier a trunk to be carried as free baggage, incidental to the contract for the transportation of the passenger, there is an implied representation that the trunk contains baggage, in the limited sense of that term; that is, the personal effects of the passenger. But no such implied representation obtains in the case where a shipper delivers a trunk for carriage under a contract for the carriage of goods and merchandise for hire wholly unrelated to the transportation of the shipper as a passenger. The carrier of goods to whom a trunk is delivered for transportation must act upon the fact commonly known to all persons that valuable goods and merchandise such as furs, silks, jewelry and laces are commonly and frequently carried in trunks by commercial travelers.

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764;

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199, 208;

Parmelee v. Lowitz, 74 Ill. 116, 119;

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354.

The implied representation to the railroad passenger carrier that a trunk tendered by a passenger for carriage as baggage contains only personal effects does not extend to a subsequent carrier of goods and merchandise for hire, like the respondents here, where such passenger and carrier status does not obtain.

McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 212, 176 N. W. 763, 764.

THE CASES CITED BY THE CIRCUIT COURT OF APPEALS

The court cited and relied on *Humphreys v. Perry*, 148 U. S. 627, 13 S. Ct. 711. The cited case is not in point here. That was an action against a passenger carrier in virtue of a contract entered into by the passenger for the carriage of the passenger. The passenger checked a trunk on his passenger ticket. Nothing was paid by the passenger for the carriage of goods and merchandise. The passenger paid 25 cents excess on account of his baggage, but of that the Supreme Court said:

"The 25 cents extra paid by Mr. Perry on account of the weight of the trunk was paid merely for the overweight, and not at all in respect of the

> contents of the trunk. It was paid for so much overweight of personal baggage."

The principle of the decision in the cited case is this, and this simply, that since the passenger carrier never received, and the passenger never paid or promised to pay, any compensation for the *carriage of goods,* the carrier having been paid only for a passenger ticket, the passenger carrier never assumed any risk of loss as a *carrier of goods.*

Doyle v. Kiser, 6 Ind. 242, cited by the Court of Appeals, was an action by a passenger against a passenger carrier. The articles lost were not entrusted to the carrier as a carrier of goods. Their carriage was paid for only by the price paid for the carriage of the passenger. The articles lost, of the value of $3,357.37, were not personal baggage, nor merchandise, but gold. The question for decision was stated by the Indiana court itself thus:

> "And the question first presenting itself is: Are common carriers of passengers liable for articles of value not transported to supply any wants of the traveler, as such, on his journey, and not made known to the carriers or their agents, or paid for as freight, but put aboard of the conveyance, by the passenger, simply as luggage, and so treated by himself on his journey?"

In the cited case, the court held the passenger carrier was not liable, not because of fraudulent concealment in consequence of the failure of the passenger to inform the passenger carrier of the nature and value of the package, but because the thing lost, not being baggage, "never went to the possession of the proprietor of the packet-boat (the

carrier), and his servants had no authority from him touching it." Said the court in the cited case:

> "It was never in his charge; had it been he would have been liable; but he never became liable for it as a carrier * * *."

In the cited Indiana case the failure of the *passenger* to disclose the nature of the contents of the parcel lost was not held to establish fraud by concealment, but to disestablish any *contract for the carriage of goods.*

Toledo, Wabash and Western Ry. Co. v. Hammond, 33 Ind. 379, cited and chiefly relied on by the Circuit Court of Appeals, was an action by a passenger against a passenger carrier. The goods lost were checked on a passenger ticket. An examination of the transcript on file in the office of the Clerk of the Indiana Supreme Court discloses that the plaintiff testified, and the jury specially found, that his trunks were carried on the train on which he traveled; that what he paid the carrier was "20 dollars in Cleveland, Ohio, for two through tickets to Peru," and the agent gave him checks for his baggage.

In the cited case, a judgment in favor of the plaintiff was affirmed. But the cited case decides no point involved in the case at bar.

In *Staub v. Kendrick,* 121 Ind. 226, 23 N. E. 79, cited by the Circuit Court of Appeals in its opinion, the Indiana court held only that a catalogue for the *personal use* of a shipper was personal baggage. The court did *not* hold, in the cited case, that the carrier would not have been liable for the loss of such catalogue *if the catalogue had not been personal baggage.*

In *Staub v. Kendrick, supra,* the carrier (a local transfer man) had posted notices that he would not carry valises.

The shipper sued for the loss by the carrier of his valise. The shipper had no knowledge of such fact or notice. The court held the carrier liable for the value of the valise and its contents.

Nathan v. Woolverton, 127 N. Y. Supp. 442, affd. 134 N. Y. Supp. 469, cited by the Circuit Court of Appeals, is contrary to earlier, as well as later, New York cases, and contrary to the great weight of the English and American cases, cited under point II of petitioners' summary of the argument. Thus in *Morgan v. Woolverton,* 203 N. Y. 52, 96 N. E. 354, 355, the New York Court of Appeals said:

> "Baggage has been defined in the dictionary as 'trunks, * * * etc., which a traveler carries with him on a journey,' and a great volume of decisions and text law has fixed the status of baggage or articles 'carried as baggage' as that of property which is transported under or as an incident to the contract of transportation of the owner as a passenger. Under the principles which have been thus abundantly established, we do not define as 'baggage' in a proper sense property which is being moved by express or otherwise apart from and disconnected with the transportation of the person who owns the same, even though it be a trunk."

For these reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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(13)

AUG 23 1941

CHARLES ELMORE CROPLEY
CLERK

No. 215

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

S. NATHAN & COMPANY, Inc.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,

vs.

RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION AND BRIEF OF S. NATHAN & COMPANY, INC., NEW HAMPSHIRE FIRE INSURANCE COMPANY FOR WRIT OF CERTIORARI

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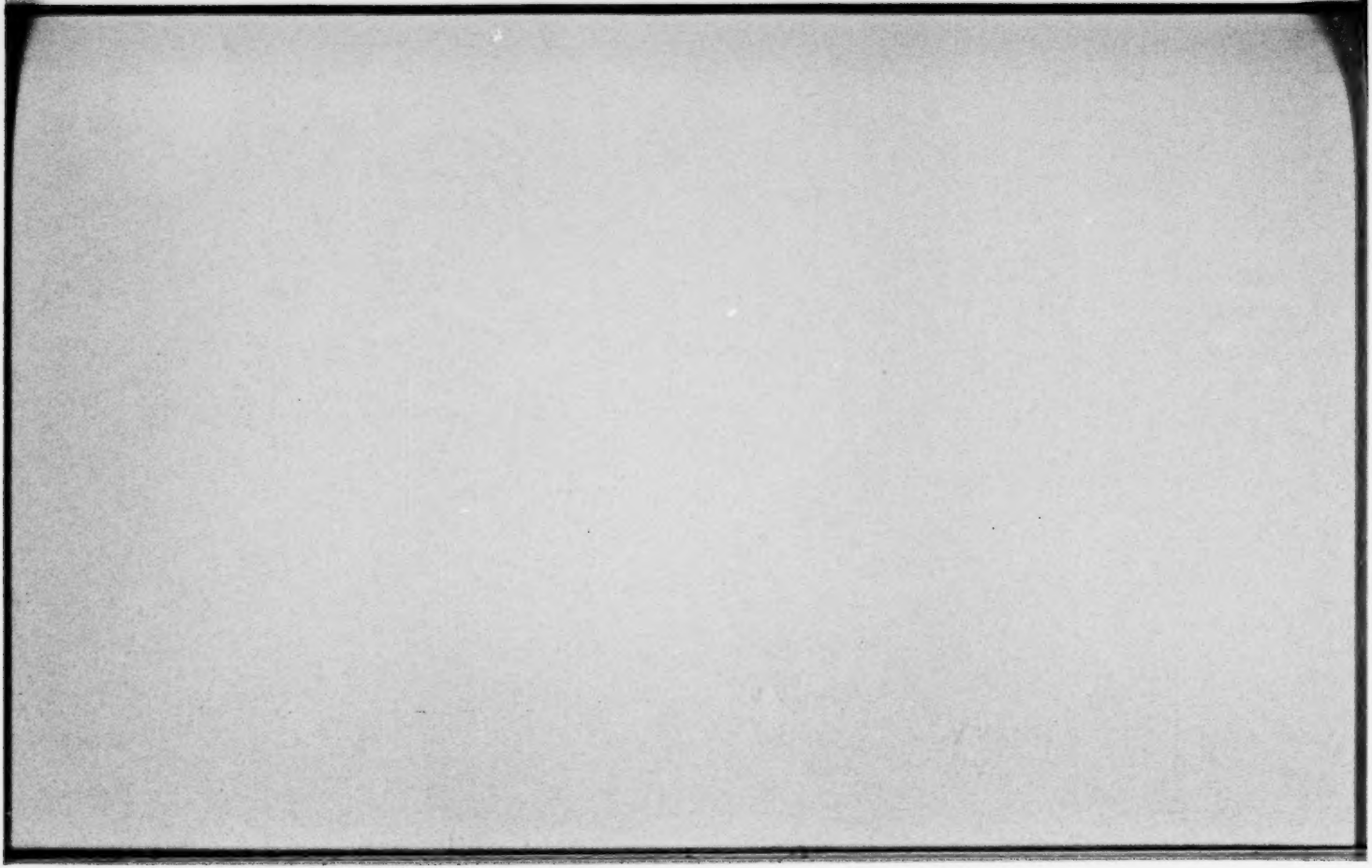

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No. 215

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION AND BRIEF OF S. NATHAN & COMPANY, INC., NEW HAMPSHIRE FIRE INSURANCE COMPANY FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In addition to the statement set forth in the petitioner's brief the respondents would point out the following pertinent facts that were involved in this case.

S. Nathan & Company, a New York Corporation, was engaged in the sale of jewelery and had employed one Jack Teichlauf as a salesman. On the 29th day of September, 1936, Jack Teichlauf traveled from Cincinnati,

Ohio, by railroad train to Indianapolis where he arrived about midnight. The respondents at such time were conducting a "baggage" transfer business at the Union Station in Indianapolis. Upon his arrival a receipt was given to Jack Teichlauf, the representative of S. Nathan & Company, Inc., for his trunk by the respondents which receipt was labeled "baggage". (R. 18.) Later the truck containing this trunk while enroute from the Union Station to a downtown hotel was stopped by robbers who broke open the same and took the merchandise jewelry contained therein. The testimony of Kenneth Grant, who was the only representative of the respondents who saw the trunk prior to the time of this robbery, was that he noticed nothing unusual whatsoever about this trunk which would in anyway attract his attention, but on the contrary stated that it "looked like an ordinary trunk". (R. 59.) While the petitioners attempted to establish at the trial the fact that the trunk was of such a character as to advise the transfer company that it might contain jewelry, nevertheless the trial court found as a fact that there was nothing in the circumstances of this case which would have reasonably led the respondents to believe that they were contracting for the transportation of anything other than a trunk containing baggage. (R. 87.) Actually Teichlauf's trunk contained his employer's merchandise jewelry of a large value.

The respondents have repeatedly asserted in their petition and brief that there was no evidence or finding of the trial court to establish fraud on the part of the shipper. While the findings of the trial court did not expressly label the conduct of Jack Teichlauf under the circumstances fraudulent, unquestionably the facts found by such trial court amounted to fraud. For the trial court found from the evidence that Jack Teichlauf, a traveler

getting off of a railroad train at the Union Station, Indianapolis, turned over to the respondents his railway baggage check and requested that his trunk be transported to a local hotel; that there was nothing from the circumstances in this transaction which advised the respondents that the trunk in question contained anything other than baggage and "Said trunk was not of such a character or construction as to notify parties handling the same that it contained a large quantity of jewelry." (R. 87.) No statement was made by Jack Teichlauf which advised the respondents that such trunk contained a large quantity of jewelry or anything other than ordinary baggage. (R. 86.) The respondents did not know that the trunk contained such jewelry and were misled as to the nature of that which they were transporting.

Summary of Argument

I.

Under the circumstances, the respondents were common carriers and subject to a legal responsibility imposed on them as such.

II.

A finding by a District Court of a fact will not be disturbed on appeal if there is any evidence to support such finding.

No. 52 of Rules of Civil Procedure of the District Courts of the United States.

McCahan Sugar Refining Company vs. Wilderoft, 201 U. S. 378, 50 L. Ed. 794 (1906).

III.

Transfer company engaged in the business of transporting trunks containing baggage entering into a contract for the carriage of "baggage" is not responsible for the loss of a quantity of merchandise, namely: jewelry of large value, which jewelry may have been present in such trunk without the knowledge of such transfer company.

(1) A traveler who contracts for the transporting of his trunk by a transfer agency with an office at a railroad station to a hotel simply by presenting a railroad baggage check to such transfer agency and receiving in lieu thereof for a consideration a check labeled "baggage" has entered into a contract for the carriage of "baggage."

Staub v. Kindrick, 121 Ind. 226, 229, 23 N. E. 79 (1889).

(2) Merchandise Jewelry of a large value contained in the trunk of a traveler is not classed under the law as "baggage."

Humphreys, et al. v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893);

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893, 896, (C. C. A. 2d 1932);

Illinois Central Railroad v. Fontaine, 217 Ky. 211, 289 S. W. 263 (1926).

IV.

If a contract is entered into with a carrier for the transfer of a trunk containing baggage the additional fact that such contract may not have also provided for the transportation of the owner of such trunk would be of no conse-

quence and would not alter the responsibility of a carrier.

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932).

V.

A shipper which remains silent under such circumstances as to conceal from the knowledge of the carrier the true nature or value of goods to be shipped as freight or baggage is guilty of fraud on the carrier and will defeat the shipper's action for the loss of such goods or merchandise concealed.

Nathan v. Woolverton, 127 N. Y. S. 442-affirmed 131 N. Y. S. 1130 (1910), 134 N. Y. S. 469-affirmed 134 N. Y. S. 1140 (1912);

Rosenfeld v. The Peoria, Decatur and Evansville Railway Company, 103 Ind. 121, 124, 2 N. E. 344 (1885);

Humphreys, et al. v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893);

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932);

Robin v. Colaizzi, et al., 166 N. Y. S. 978, 101 Misc. Rep. 298 (1917);

Hutchinson on Carriers (3d Ed.), Volume One, Sections 330, 331 (1906);

American Jurisprudence, Vol. 9 S. 701 (1937).

VI.

A defense of fraud referred to above which provides a bar to an action for loss of merchandise by a shipper is not confined to a contract which provides for the transportation of such shipper as well as his trunk containing

merchandise, but also applies to a contract solely for the transportation of such trunk.

Gilman v. Postal Telegraph Co., 95 N. Y. S. 564 (1905);

Harrington v. Wabash Railroad Company, 108 Minn. 257, 122 N. W. 14 (1909).

VII.

The decisions of the trial court and Circuit Court of Appeals with respect to the question presented by this case are in harmony with the decisions of the state courts in Indiana where the transaction involved in this case took place.

Staub v. Kindrick, 121 Ind. 226, 229, 23 N. E. 79 (1889);

Doyle v. Kiser, 6 Ind. 242 (1855);

Toledo Wabash & Western Ry. Co. v. Hammond, 33 Ind. 379 (1870).

ARGUMENT

It is conceded that the respondents were common carriers and subject to the legal responsibility imposed on them as such. It is likewise conceded that the legal responsibility of the respondents as common carriers was ordinarily that of an insurer subject to a certain well recognized legal exceptions.

It should be noted that the petitioners are at this point again chiefly raising the contention that the District Court was not warranted in making certain of its findings of fact. The petitioners emphasize that the evidence in this case would require a finding that the respondents were engaged in the business of transporting more than what is commonly known as baggage. The parties stipulated at the time of the trial that the business of the respondents was the transporting to and from the Union Station at Indianapolis of what is commonly known as baggage. There was some little evidence that occasionally a salesman getting off the train at Indianapolis would arrange with the respondents to have his trunks or suitcases transported which might include a "sample" case. This court, of course, will recognize that such would be true in any railroad station in a city of any size in this country. But from all the evidence the trial court found that the respondents were engaged in the transportation of baggage and that the check given to Mr. Jack Teichlauf was labeled "Baggage" and finally that the respondents reasonably believed that they were transporting a trunk containing ordinary baggage and that there were no circumstances which would have reasonably led the respondents to think otherwise. At least it must be conceded

that the evidence was sufficient to warrant the District Court in making such a finding even though it might be urged that the testimony on the subject was conflicting. Rule 52 of Rules of Civil Procedure of the District Court of the United States provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

This, would properly be the position of this court when the record would disclose that this finding of the District Court was concurred in by Circuit Court of Appeals.

> W. J. McCahan Sugar Refining Company v. Wildcroft, 201 U. S. 378, 50 L. Ed. 794 (1906).

The same consideration pointed out above would likewise justify the finding of the District Court that there was nothing about the trunk in question which would advise the respondents of the fact that such trunk contained a quantity of merchandise jewelry of large value. The respondents petition and brief is almost entirely predicated on the assumption that we do not have presented by this case a situation where fraud or artifice of the shipper was proven or found by the District Court. While the District Court did not specifically label the circumstances of this case as one of fraud or artifice on the part of the shipper, certainly facts were found by the District Court which would legally amount to exactly that. Such facts having been found by the District Court and the record having presented some evidence to substantiate such findings it would seem of no consequence that the District Court did not specifically label such facts as legally constituting artifice or fraud.

The decision of the Circuit Court of Appeals can be sustained on the theory that the contract between the respondents and the petitioners was for the transportation of a trunk containing baggage. Teichlauf came to Indianapolis by railroad from Cincinnati. He went to the respondents desk located at the Union Station at Indianapolis, Indiana, and presented to such respondents' representative a railroad baggage check just as any other traveler would have done. The respondents took such check and, for a consideration, delivered to Teichlauf a receipt labelled "baggage." There was nothing about the nature of the trunk which was loaded on the respondents truck by one of its representatives which attracted such representative's attention. To him it looked like an ordinary trunk. It is fair to conclude from the above set of circumstances that this was a contract for the transportation of baggage.

The Indiana Supreme Court has concluded on an identical set of circumstances that the nature of such contract was one for the transportation of baggage. This question was presented to the Indiana Supreme Court in the case of Staub v. Kindrick (1889), 121 Ind. 226. In that case, Staub, the defendant, was engaged in the transporting of trunks and baggage in the City of Terre Haute to and from various hotels and railroad stations. Kindrick was a travelling salesman for a firm of wholesale hardware dealers. Immediately after his arrival at the Union depot, he engaged one of Staub's employees to convey his two trunks and valise to another railroad station in Terre Haute and paid him the price asked for transporting the same. Staub's employee took possession of the trunks and valise and gave Kindrick three checks for them. The valise containing a travelling salesman's illustrated catalog of the value of $50.00 was lost. In holding the

defendant liable for the value of the catalog the Court said:

> "It is a book used by him in the business in which he was engaged. He carried it with him for his personal use and convenience, and it is found to be a necessary article for him to carry to properly discharge the duties of the busines in which he was engaged and the object for which he was travelling."

In a further discussion of the reasons for holding the catalog to be "baggage" the Court enunciated the accepted common law definition of "baggage;"

> "It must on the whole be held, we think, that the book in question was an article of personal baggage within the definition above given and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff according to the wants of the particular class of travelers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise of the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda convenient and necessary for him personally in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon the subject." (page 229.)

The authorities would seem to be clear that merchandise carried in a trunk or luggage of a traveler is not classified as baggage. This is particularly true of jewelry of a valuable character. A leading case on this question is Humphreys, et al. v. Perry, et al. 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893). In this case a traveling salesman for a firm of jewelers bought a ticket over the railroad of which defendants had been appointed Receivers. The salesman for the jewelry company received a baggage

check for his trunk, but said nothing with respect to its contents. The trunk contained a stock of jewelry from which sales were to be made to his employer's customers, but there was nothing of a definite character to indicate to the representatives of the railroad that such trunk contained a large quantity of jewelry. The car in which the trunk was placed was thrown from the tracks and the trunk and its contents were destroyed by fire. In holding that the railroad's liabiliy was only for personal baggage and that the value of the jewelry could not be recovered the Court said:

> "In the present case the trunk was offered as containing the personal baggage of a passenger. The passenger did not inform the baggage agent as to the actual contents of the trunk. The agent did not know what the trunk contained. There is no evidence that any agent of the receivers had theretofore received and checked a trunk as the personal baggage of a passenger, knowing that it contained a stock of jewelry; and it does not appear that any railroad company would issue a check to a passenger for a trunk, if previously informed that the trunk contained a valuable stock of jewelry."

On petition for rehearing of Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932), the court said:

> "The words 'separate contract of affreightment' were used in the opinion because the plaintiff had not purchased a railroad ticket at the time when the special contract to carry the trunks from Havre to Paris was made. Therefore the contract was not strictissimi juris for the carriage of 'baggage' and was a special contract of affreightment. Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 36 L. R. A. (N. S.) 640; Sunders v. Southern Ry. Co. (C. C. A.) 128 F. 15. But we have not meant to say that the parties ever

> manifested an intention to have the obligation of a common carrier extend to belongings which could under no circumstances be considered 'baggage', unless their nature was disclosed. The surrounding circumstances of this case contravene the imposition of any such unlimited liability." (Page 896.)

The petitioners have placed great stress in their brief on the fact that the contract in question was not one calling also for the carriage of the person of a shipper as well as his property. While it is true that a passenger on a railroad train checking a trunk under ordinary circumstances is held to have contracted for the transportation of what is known as baggage, can it be reasonably contended that it is never legally possible under other circumstances to contract for transportation of baggage? The respondents have never assumed that Teichlauf was to be transported on the respondents truck with his trunk and his employer's jewelry. Nor have respondents assumed that there are not possible sets of circumstanaces such as were set forth in some of the decisions cited by petitioners where it could be fairly said that the contract was for transportation of something more than baggage. The respondents have urged, however, that under all the facts of this case it is proper to conclude that the respondents entered into a contract for the transportation of a trunk containing "baggage."

The decision of the Circuit Court of Appeals furthermore can be sustained on an entirely different theory, namely, that the facts of this case would amount to a fraud on the respondents of such a character as to provide a legal defense to petitioner's claim irrespective of whether the contract in question be construed as one for transportation of baggage or otherwise.

There are two decisions involving the petitioner, S. Nathan & Company, Inc., where the courts of New York have had occasion to pass on exactly this question. Once before this petitioner herein, or at least the firm of which this petitioner was the successor (R. 41) brought suit for valuable jewels checked in a trunk with the New York Transfer Company, which jewels were subsequently lost. The court in that case enunciated what would seem to be the law generally recognized with reference to our question. The New York court stated:

> "I cannot see how any other conclusion can be arrived at, if the contract is deemed complete when the check was delivered to defendant's agent and plaintiff took defendant's check. There is nothing about such a transaction to warn defendant, or in any way to indicate to him, that plaintiff's trunk was anything but ordinary personal baggage; nothing to indicate that, instead of receiving the ordinary personal apparel of the ordinary traveler, of very limited value, he was receiving a stock of merchandise of very large value. I do not think it can be presumed that travelers ordinarily carry baggage of such value or character as is here shown. Again quoting from Magnin v. Dinsmore:
>
> > " 'A shipper may become chargeable with fraud upon a carrier, through imposition and deception, as well when he is silent as when he speaks that which is untrue. A neglect to disclose the real value of a package, and the nature of its contents, if therewith there is that in its form, dimension, and other appearance designed, and, even if not designed, if fitted, to throw the carrier off his guard, will be conduct amounting to the fraud now spoken of. The intention to impose upon the carrier is not material. It is enough if such is the practical effect of the conduct of the shipper.'

> "When a check, without explanation, is presented to a carrier, it seems to me it cannot be disputed that it is tantamount to a representation that it is an ordinary trunk containing ordinary baggage; and, if it subsequently transpires, that the trunk in fact did contain a large amount of jewelry, it is a fraud upon the carrier which will relieve the carrier from liability. 6 Cyc. 668; Orange County Bank v. Brown, 9 Wend. 85, 24 Am. Dec. 129."

The Supreme Court of Indiana has given recognition to this doctrine of fraud. In Rosenfeld v. The Peoria, Decatur and Evansville Railroad Company, 103 Ind. 121, at page 124 (1885), the Court said:

> "If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he is enabled to consummate a wrong upon the carrier which should not be sustained by the courts. Graves v. Lake Shore, etc., R. R. Co., 137 Mass. 33 (50 Am. R. 282); Hart v. Pennsylvania R. R. Co., 112 U. S. 331.
>
> "To hold the carrier liable in such a case for the full value of the article beyond the representation of the shipper, would seem to be neither just nor reasonable; and if neither just nor reasonable, such holding is not demanded by any considerations of public policy."

This rule recognized in the cases cited herein is well stated in Hutchinson on Carriers (3rd Ed.) Volume one, Section 330, as follows:

> "Sec. 330 (No. 213) Same subject—Neglect or failure to disclose contents or value. Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions or other outward appearance as is calculated to throw the carrier off his guard, whether

> so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard and neglects to give to the package the care and attention which he would have given it had he known its actual value."

It should be noted that the District Court made the finding that the respondents were misled by the conduct of Teichlauf under the circumstances of this case. That finding the petitioners must recognize to be conclusive. So the respondents are thereby once again compelled to fall back on the contention that the legal principle of fraud is applicable only to cases where there is a contract for transportation of the person and his property not to a case where property alone is to be transported. Granted that fraud was present why the defense should be applicable in one case and not in the other is most difficult to ascertain. No decision cited by petitioners would support such a distinction. On the other hand, there are cases which have applied this doctrine of fraud to a situation where no carrier-passenger relationship is involved. An illustration is afforded in the case of Gilman v. Postal Telegraph Company, 95 N. Y. S. 564 (1905). The plaintiff called the defendant, Postal Telegraph Company, for a messenger to deliver a package which contained a substantial sum of money wrapped in a newspaper. No statement was made to the Postal Telegraph Company as to the contents of such package. The package was lost by the messenger boy. Suit was instituted for the recovery of the amount of money in question. The Court held that the

defendant was a common carrier, but had been deceived by failure of the plaintiff to advise the defendant that such package contained a sizeable amount of money. The Court in denying recovery in such case stated:

> "This, however, was not dealing fairly by the defendant; for if it was not intended to rely upon defendant's responsibility, no method or device should have been resorted to with a view to concealing the nature and extent of the responsibility sought to be imposed upon it." (At page 565.)

The decision of the Circuit Court of Appeals properly pointed out that the Indiana law would be controlling in a case of this character. The petitioners insist that the Indiana law is not in harmony with the decision in question. While it is recognized that these decisions referred to in the Circuit Court of Appeals decision do not squarely cover our situation, certainly the views expressed therein are in harmony with the opinion of the Circuit Court of Appeals and out of line with the theory urged by the petitioners. One of the cases cited by the petitioners is McQuat v. Cook's Taxi Cab Co., 176 N. W. 763, wherein the ~~Circuit~~ Supreme Court of Minnesota refers to the fact that the Indiana courts have followed the rule which was adhered to by the New York Court in the case of Nathan v. Woolverton, 127 N. Y. Supp. 442. The Minnesota court cited as evidence of its understanding that the Indiana rule was the same as that followed by the New York courts the case of Staub v. Kendrick, 121 Ind. 226.

The petitioners at the conclusion of their brief would insist that the case of Nathan v. Woolverton, 127 N. Y. Supp. 442, cited by the Circuit Court of Appeals, is contrary to earlier as well as later New York cases. It should

be noted that the New York courts do not concur in this conclusion urged by the petitioners. The Nathan case was first decided in 1910 and later affirmed in 1912. In the case of Robin v. Colaizzi, 166 N. Y. Supp. 978, decided in 1917, the Nathan case was cited with approval. Later in 1920, Waters v. Beau Site Co., 186 N. Y. Supp. 731, likewise specifies the Nathan case as the New York authority on the legal proposition with which we are here concerned.

The decision of the Circuit Court of Appeals can be sustained on the theory that no contract was entered into here for the transportation of anything other than baggage. While it is true that there is some authority in states other than Indiana which would hold a transfer company liable for articles in a trunk that might not ordinarily be construed as baggage, no case has been cited which would approach the extreme of holding that a transfer company was liable for the loss of merchandise of the value of $14,267.96, which jewelry, unknown to such transfer company, was present in a trunk of a traveler under the circumstances of this case. The decision of the Circuit Court of Appeals can on the other hand be sustained even if it should be concluded that this contract was for the carriage of a trunk not necessarily containing baggage. For the District Court properly found as a fact that the conduct of the shipper misled in a material way the carrier as to the nature of the articles which it was transporting. This conduct would constitute a fraud on the carrier and

would under the decisions both in Indiana and elsewhere constitute a legal defense to petitioners' action.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(17)

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CHARLES ELMORE CROPLEY
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IN THE

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OCTOBER TERM, 1940

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Petitioners,
v.
RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

No. 215.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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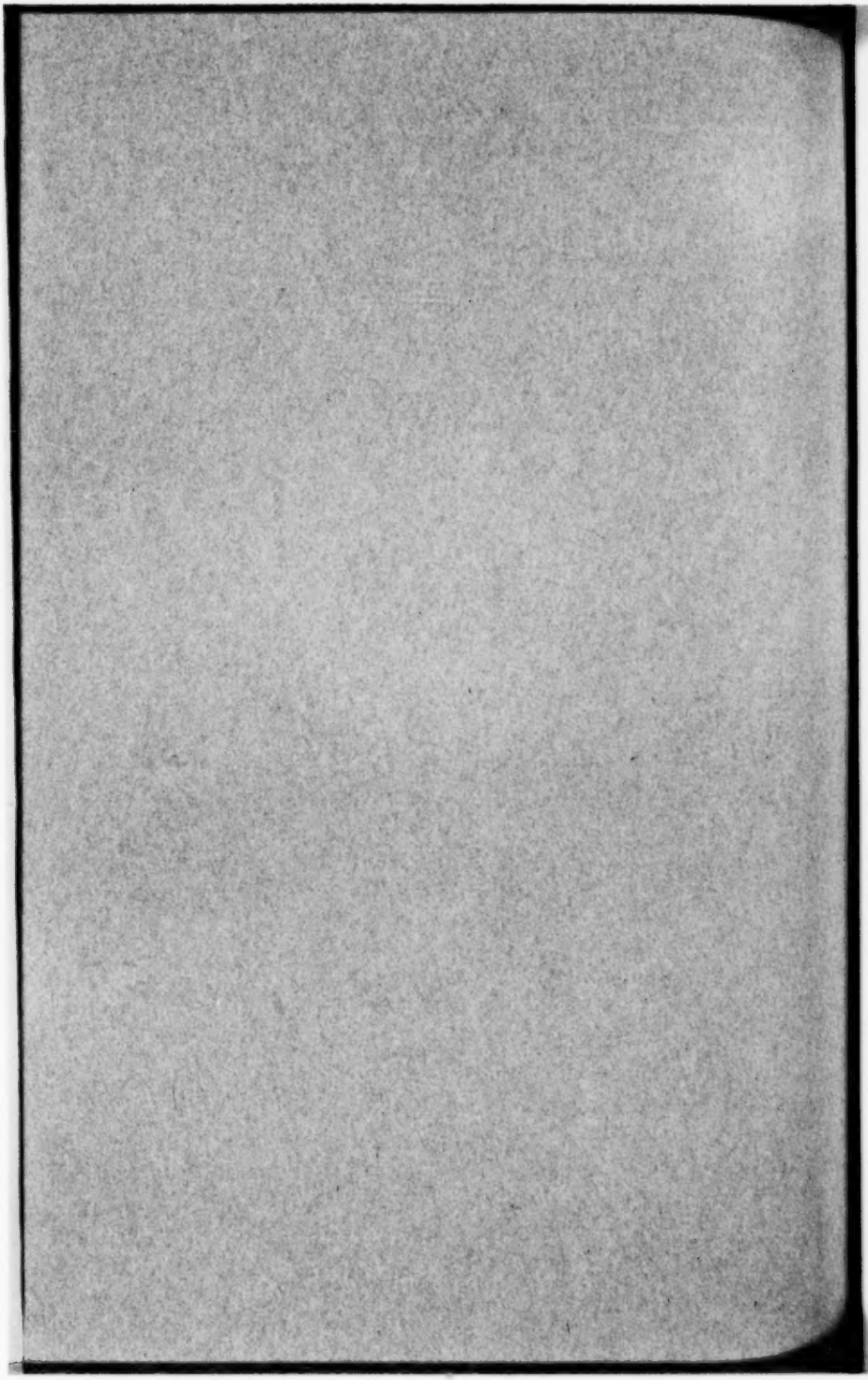

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,
v.
RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.
No. 215.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Respondents in their brief make the following misstatements of fact:

(a) On page 2 in their Statement of the Case, and again on page 7 in their Argument, respondents state that the receipt given by respondents to Teichlauf, represent-

ative of petitioner S. Nathan & Company, Inc., upon the payment of the charge for the transportation of the trunk to be carried, was labeled "baggage."

An examination of the record will disclose that there is no finding and no evidence to that effect. The receipt definitely was not so labeled. (R. 18.)

The word "baggage" does not appear upon such receipt (R. 18) excepting as a part of the symbol of the name and telephone number of respondents.

(b) On page 7 of their brief, in their Argument, respondents say that the District Court found that respondents reasonably believed that they were transporting a trunk containing ordinary baggage. An examination of the record will disclose that there is no such finding nor any evidence to that effect. (R. 16, 52, 53, 84.)

(c) At page 15 of their brief, respondents say that the District Court made the finding that the respondents were misled by the conduct of Teichlauf, the salesman for petitioner S. Nathan & Company, Inc. Such statement by the respondents is not sustained by the record. There was no such finding.

The appearance of the trunk to be carried was not considered or relied on by the respondents, since the agreement to carry the trunk was concluded without any observation or inspection of the trunk. (R. 52, 53.)

The evidence and the findings alike show that the respondents agreed to carry the trunk identified solely by the claim check for a trunk, which claim check was delivered to respondents with the request that respondents transport the trunk identified by such claim check, and which they agreed so to transport. (R. 52.)

The undisputed evidence is that the respondents do not make inquiry of a shipper and never inspect a trunk to ascertain the value of its contents (R. 52, 53), and the agent of respondents, who contracted for them to carry this trunk, testified that he never at any time refused to transport any trunk or sample case from the Union Station to the hotels. (R. 54.)

(d) Respondents at page 7 of their brief state that the parties at the time of the trial stipulated that "the business" of the respondents was the transporting to and from the Union Station at Indianapolis of what is commonly known as baggage. Instead it was stipulated that the respondents were "engaged in the business" of transporting baggage for hire to and from such Station for the public generally.

It was not stipulated that the business of the respondents was *limited* to the transporting of what is commonly known as baggage, nor was it stipulated that the business of the respondents was the transporting of baggage *as an incident to the transportation of passengers;* nor was there any finding by the court that the business of the respondents was that of transporting baggage, in the passenger-carrier sense, nor any finding that the trunk in question was being transported as baggage or as an incident to the transportation of a passenger.

It was stipulated by the parties that "each and any of the parties hereto should have the right, upon the trial, to introduce any additional competent, relevant and material evidence not in contradiction of anything herein stipulated." The additional uncontradicted evidence (of the Secretary and Treasurer of respondents) was that the respondents were engaged also in the business of trans-

porting trunks and sample cases of commercial travelers. (R. 52-54.) The additional uncontroverted evidence indisputably shows that the trunk here was being carried by respondents in pursuance of a contract expressly for its carriage, and not as an incident to the transportation of a passenger. (R. 22, 39, 55.)

SUMMARY OF ARGUMENT

I. The contract of carriage here involved was not one for the incidental transportation by respondents of the personal baggage of a passenger; instead the contract was one for the transportation of goods for hire, unrelated to the carriage of a passenger.

II. The implied representation of a passenger to a passenger carrier respecting the contents of a trunk to be carried as an incident to the transportation of a passenger does not apply to the case of a contract with a transfer company who, as a carrier of goods for hire, undertakes to carry a trunk as merchandise, and not as an incident to the transportation of a passenger.

III. The word "baggage" means one thing when employed to designate a trunk carried by a carrier of goods for hire, and a different thing when employed to designate a trunk carried by a carrier of passengers as an incident to the transportation of the passenger.

IV. The carrier of goods for hire may not, even by contract, limit its liability for the full value of the shipment entrusted to it, without giving to the shipper, whether of a trunk or sample case or other goods, notice of the

carrier's limited liability, and a choice of rate differentials, if such it have. Hence, no limitation results from the mere silence of the shipper, unasked by the carrier.

V. There was no fraud of the shipper, either proven or found.

ARGUMENT

Respondents' brief fails utterly to refute petitioners' proposition of law that it is not the duty of the shipper, in the absence of inquiry by the carrier, to inform the common carrier of goods for hire of the value of the goods the carrier undertakes to carry, and that mere silence of the shipper, therefore, does not constitute fraud on the shipper's part.

Indubitably the English and American rule is that it is not the duty of the shipper to initiate action, or take steps, to limit the carrier's liability to less than full value; instead the duty of initiating action, and taking steps, to limit its liability is that of the carrier.

In their petition for a rehearing, filed in the Circuit Court of Appeals, petitioners have set forth excerpts from many of the cases cited in our original brief filed in this court, stating the foregoing as the correct rules of law. (R. 133-152.) The court may find it helpful to read such excerpts.

The respondents undertake to escape the effect of these rules of law by urging factual considerations contrary to, and not sustained by, the record.

NATURE OF THE CONTRACT HERE INVOLVED

Throughout their brief the respondents repeatedly assert the fact to be that the receipt or claim check given by respondents to petitioners' agent was labeled "baggage" (p. 2, l. 7; p. 4, l. 12; p. 9, l. 11); and they assert that the District Court made a finding to that effect (p. 7, l. 25). Upon these two false assumptions of fact, respondents

argue that the express contract of carriage here involved was one in which the subject-matter was "baggage" in the limited sense of personal baggage, and that articles of jewelry are not within the purview of such contract of carriage.

In no manner is such receipt (Exhibit A, R. 18) labeled "baggage" as claimed by respondents in their brief. Such receipt, ostensibly that of respondent Frank Bird Transfer Company, does not even contain the word "baggage" except in conjunction with a telephone number printed thereon where the words Frank Bird or Yellow Baggage are given as the companies to whom the telephone number applies.

The representative of respondents who, for the respondents, made and entered into the contract for the transportation of the trunk in question testified, on cross-examination, that the shipper's agent gave the respondents' such agent a claim check for a trunk, and told him, and told him only, that he wanted his trunk sent to the Claypool Hotel. (R. 53.) No questions were asked and no statements were made respecting the nature of the trunk or its contents or the value of its contents.

Mr. Kackley, secretary and treasurer of the respondents, stated that the respondents were engaged in the business of transporting trunks and baggage from the Union Station to downtown hotels and, as a part of its baggage transfer business, transported trunks for commercial travelers from the Union Station to downtown hotels. (R. 49-50.)

Mr. Pinkston, the dispatcher for the respondents, testified that the Frank Bird Transfer Company hauled and transported trunks and sample cases for commercial

travelers from the Union Station to downtown hotels. (R. 52.)

Such evidence, in no wise contradicted, does not establish, or tend to establish, the making of a contract with respondents for the transportation of the trunk in question as "baggage" in the limited sense of the personal effects of a passenger; nor did the District Court find that any such contract was made with respondents.

It is hardly necessary to point out that the implied representation to the railroad company, over whose line of railroad the shipper's agent came to Indianapolis, arising in virtue of the passenger and carrier status obtaining between the shipper's agent and the railroad company, did not extend to the respondents as transfer companies to whom the shipper's agent presented his railroad claim check to enable the respondents as transfer companies to obtain possession of the trunk from the railroad company at the Union Station.

One who contracts with a transfer company for the transportation of his trunk at an office of such transfer company located at a railroad station, by presenting to such transfer company a railway baggage claim check for the purpose of enabling the said transfer company to obtain possession of such trunk from the railroad company, does not thereby enter into a contract with the transfer company for the carriage of such trunk as "baggage" in the limited sense of the term to denote "passenger baggage."

McQuat v. Cook's Taxicab & Transfer Co. (Wis.), 176 N. W. 763, 764;

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199;

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 355;

Parmelee v. Lowitz, 74 Ill. 116.

Thus in *McQuat v. Cook's Taxicab & Transfer Co.* (Wis.), 176 N. W. 763, 764, the court said:

> "We appreciate the argument that the transfer company and the owner of the baggage should be held to intend, as an implied term of their contract, that the baggage tendered for transportation is such as a passenger may carry on the train and for which he may recover in the event of loss. It is forcefully presented. We, however, reach the conclusion that such term should not be imported into the contract."

The Wisconsin court, in the cited case, further held and said:

> "But for the relation between carrier and passenger incidental to which baggage is carried there would not be a limitation of liability."

In the case at bar there existed no carrier and passenger relation.

The case of *Wiener v. Campagnie Generale Transatlantique*, 61 Fed. (2d) 893, cited and relied upon by the respondents, is not in point. The facts in that case were that the parties had contracted for the transportation of the property as "baggage," and the record on appeal in that case disclosed that the plaintiff and the defendant entered into a contract to carry plaintiff's goods from New York to Paris as "baggage."

In the cited case the baggage was destroyed while on the passenger train between Havre and Paris at a time

when the plaintiff was not a passenger on the train. The plaintiff sued to recover for the loss of "baggage."

The language of the court which counsel opposed have quoted in their brief is an answer to respondents' contention in this case. Clearly what was meant by the court in the cited case by the language quoted by respondents in their brief was that the defendant's responsibility as an insurer would be limited in that case to property classified as "baggage" inasmuch as the plaintiff in the cited case, by his pleadings, was only claiming and suing for the loss of his "baggage."

The Indiana cases cited by respondents were distinguished by us in our original brief from the case at bar.

Clearly there is no contract here, either express or implied, either proven or found, for the carriage of the trunk as the personal baggage of a passenger.

CONNOTATIONS OF THE WORD BAGGAGE

That the term "baggage" means one thing when employed to describe property being transported as an incident to the transportation of the owner as a passenger and another thing when employed to describe property being transported independently of, and apart from, the transportation of the owner as a passenger, is fully recognized by the authorities.

In *Stanfield v. Frank Parmelee Co.*, 223 Ill. App. 199, the court said:

> "The word 'baggage,' it will be seen, has two connotations. It means one thing when used to describe articles transported in a trunk by a railroad as an incident to the transportation of their

owner, and another thing when used to describe articles transported in a trunk or box or other receptacle unrelated to the transportation of their owner, by a transfer company for a specified compensation."

To the same effect are:

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 355;

Atlantic Coast Line R. Co. v. Campen Bros. Co. (Fla.), 154 So. 131, 133;

Parmelee v. Lowitz, 74 Ill. 116;

McQuat v. Cook's Taxicab & Transfer Co. (Wis.), 176 N. W. 763, 764;

Hannibal & St. Joseph R. R. Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423, 429.

HOW LIABILITY OF A COMMON CARRIER OF GOODS MAY BE LIMITED

Since the undisputed evidence is that the respondents, as a part of their transfer business, transported trunks and sample cases for commercial travelers and traveling salesmen to and from the Union Station to and from downtown hotels in the City of Indianapolis at and prior to the time of the loss here involved, (R. 50-52) it would be absurd to say that respondents, as common carriers of goods for hire, engaged in transporting baggage, including salesmen's trunks and sample cases, may limit their liability to the loss of such property only as may be personal "baggage," merely by refraining from making any inquiry respecting the nature or value of the thing tendered to them for transportation.

It is elementary that the carrier of goods for hire may not by contract, limit its liability without giving to the shipper, whether of a trunk or sample case or other goods, notice of the carrier's limited liability, and a choice of rate differentials, if any it have.

The logic of the rule requiring common carriers to limit their liability by contract with, or notice to, the shipper in order to avoid full responsibility as an insurer, was recognized by this court in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 S. Ct. 151, at page 155, where this court said:

> "This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

To impose upon respondent's customers any limitation of liability of respondents under the circumstances of this case would be tantamount to incorporating a term and condition into the contract of carriage which the parties themselves did not make.

Surely under the circumstances of this case the logical and applicable rule requires that if the carriers of goods would limit their responsibility, they must do so by contract with, or upon notice to, their customers, and having failed to do so, their common law liability exists. This view was forcefully stated by the Illinois Supreme Court in the case of *Parmelee v. Lowitz*, 74 Ill. 116, as follows:

> "The latter rule seems to be the more reasonable for it may well be assumed that travelers, generally, are not familiar with the nice distinction between railroad baggage on the one hand and ordinary baggage on the other, whereas the transfer com-

pany, conducting its business as a common carrier for private profit and fixing its own charges for its services, if desirous of complete knowledge in order to limit its liability and determine the necessity for making an extra charge, may properly inquire of the owner to any extent it sees fit as to the nature of the property offered for transfer, and then, with its eyes open, act in the matter."

Rosenfeld v. The Peoria, Decatur and Evansville Ry. Co., 103 Ind. 121, 125, cited by the respondents, squarely announces the petitioners' proposition that respondents may not enforce any limitation of their common law liability without showing that the shipper had knowledge of it, or that his statements or conduct justified the carrier in limiting its liability. In that case, the Indiana Supreme Court held that the burden was upon the carrier clearly to show that his liability had been limited and that all such contracts would be interpreted most strictly against the carrier. In the last cited case the court said:

"Another rule of law, that seems to be settled by the weight of authority, is that if the carrier claims that, by contract or the misconduct of the shipper, his common law liability has been limited, the burden is upon him to clearly show it, and all such contracts will be interpreted most strictly against the carrier.

"In the case of *St. Louis, etc., R. W. Co. v. Smuck, supra*, this court said: 'But, in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them as such, should be construed most strongly against them.' *Indianapolis, etc., R. R. Co. v. Cox*, 29 Ind. 360; Lowson Contracts of Common Carriers, Sections 135, 246, and cases there cited. And so, too, that carriers may, by fixing

> value, limit this common law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value, as we have before stated."

Such also is the statutory rule in Indiana. Sec. 55-1402, Burns' Ind. Stat. Anno. 1933.

THERE IS NO FRAUD FOUND OR PROVEN

Emphasis in respondents' brief is placed upon alleged constructive "fraud" arising out of the shipper's omission, unasked, to reveal the contents of the trunk in question.

As the first step in spelling out such supposed fraud, respondents again indulge in the misstatement that the District Court found that the respondents were misled by the conduct of petitioners' agent under the circumstances of this case (Respondents' Brief, p. 15, l. 12). The special findings of fact reveal no such finding, and in fact come no closer to such a finding than to hold in the negative the respondents had no knowledge of the contents of the trunk in question.

In support of their fraud theory, respondents rely chiefly upon the decision in *Nathan v. Woolverton*, 127 N. Y. S. 442, in support of their proposition that mere silence will spell out fraud. But as pointed out in petitioners' original brief herein, the decision in *Nathan v. Woolverton*, 127 N. Y. S. 442, is not the law in the State of New York upon this proposition because of the decision of the Court of Appeals of New York in *Morgan v. Woolverton*, 203 N. Y. 52. Respondents, however, persist in their contention that the case of *Nathan v. Woolverton*, 127 N. Y. S.

42, represents the law of the State of New York upon the proposition, and they cite two later cases as approving that case, namely: *Robin v. Colazzi*, 166 N. Y. S. 978, and *Water v. Bean Site Company*, 186 N. Y. S. 731. The attention of this court need not be called to the fact that the Court of Appeals of New York, which decided the case of *Morgan v. Woolverton*, 203 N. Y. 52, 96 N. E. 354, 355, is the court of last resort in the State of New York, whereas the Appellate Division, the Appellate Term, and the City Court, which decided the cases cited and relied upon by respondents, are all inferior in jurisdiction to the Court of Appeals of New York. Therefore, since the Court of Appeals of New York, in *Morgan v. Woolverton*, 203 N. Y. 52, 96 N. E. 354, 355, permitted a recovery of $1,200.00 for the loss of the contents of a trunk in a holding which limited the definition of "baggage" to those cases where there was present the essential relation of baggage to the transportation of the person who owned it, the principle of that case must be taken as the New York law. See also *Gorham Manufacturing Company v. Fargo*, (N. Y.) 45 How. Prac. 90, 92.

There being no finding of deceit or intent to deceive, or of artifice used to conceal the true nature of the contents of the trunk in suit, petitioners cannot be charged with fraud under the authorities heretofore cited in their original brief and in their reply brief herein.

As was said in Williston on Contracts, Vol. 2, Section 1110 (1920),—

> "the carrier can hardly assert that it has been deceived unless it makes inquiry of the shipper in regard to the value of the goods, or unless the exterior appearance of the goods is such as to

amount to a representation that they are different in kind or value from what is actually the case."

Petitioners respectfully submit that their petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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